Securities and Exchange Commission v. Nadel et al
Doc. 668 Att. 3

EXHIBIT C

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BURTON W. WIAND, as Receiver for VALHALLA INVESTMENT PARTNERS, L.P.; VIKING FUND, LLC; VIKING IRA FUND, LLC; VICTORY FUND, LTD.; VICTORY IRA FUND, LTD.; SCOOP REAL ESTATE, L.P.
_________________________________/

Case No.: 8:10-cv-71-T-17MAP *et al.*
(see attached **Exhibit A**)

THE RECEIVER'S OBJECTIONS TO THE MAGISTRATE JUDGE'S JUNE 8, 2011 OMNIBUS REPORT & RECOMMENDATION*

* These objections are being filed in each case listed in Exhibit A.

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INTRODUCTION

On February 24, 2010, Arthur Nadel ("**Nadel**") pled guilty to a criminal indictment charging him with using purported hedge funds, and now receivership entities, Valhalla Investment Partners, L.P. ("**Valhalla**"); Viking Fund, LLC ("**Viking**"); Viking IRA Fund, LLC ("**Viking IRA**"); Victory Fund, Ltd. ("**Victory**"); Victory IRA Fund, Ltd. ("**Victory IRA**"); and Scoop Real Estate, L.P. ("**Scoop**") (collectively, the "**Hedge Funds**"), and their purported managers, Valhalla Management, Inc. ("**Valhalla Fund Manager**"), Viking Management, LLC ("**Viking Fund Manager**"); and Scoop Management, Inc. and Scoop Capital, LLC (collectively, "**Scoop Fund Managers**", and collectively with Valhalla Fund Manager and Viking Fund Manager, the "**Fund Managers**"), to perpetrate a massive and continuous Ponzi scheme (the "**scheme**") from 1999 until January 2009. That indictment charged Nadel with six counts of securities fraud, one count of mail fraud, and eight counts of wire fraud for perpetrating the exact same scheme using the exact same Hedge Funds that underlie these cases. Nadel's guilty plea operated as an admission of all allegations and charges in his indictment.

The scheme left hundreds of investors with collective losses of approximately $160 million. In contrast to those investors, the defendants in these cases received from the scheme more than they invested and consequently enjoyed "false profits."[1] Although presently all but one of the complaints in these cases seek recovery of false profits, seven of

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[1] A list of all cases in which motions to compel arbitration were filed is attached as Exhibit A. For each case, the exhibit includes the docket number for the report and recommendation, the Hedge Fund in which the defendants "invested", and the amount sought in the operative complaint.

these cases have pending motions to amend complaints. Following those amendments, those seven cases will join the other case as ones in which, Plaintiff Burton W. Wiand, as Receiver (the "Receiver") will seek recovery of all money defendants received from the scheme, and not only false profits. The defendants in each of those cases were either professional investment funds (so-called "feeder funds") or advised by professional investment advisors who, at a minimum, should have known of significant "red flags" surrounding the Hedge Funds.[2] The money received by the defendants was not their money – it was the stolen and commingled money of all investors and, in large part, of investors who suffered losses. The Receiver filed these (and other) "clawback" cases to recover money received from the scheme because that money is Receivership property, and the defendants have no right – legal or equitable – to keep those stolen funds.

Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-15 (the "**FAA**"), the defendants in these 23 cases have moved to compel arbitration[3] (the "**motions to compel**")

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[2] The red flags, all of which were either documented in the public record or otherwise disclosed to investors, included: (1) Nadel was disbarred from practicing law in New York State for engaging in "dishonesty, fraud, deceit and misrepresentation" by misusing escrow funds; (2) Nadel had at least eight money judgment against him in Sarasota County for failure to pay amounts owed; (3) in divorce proceedings, Nadel was accused of having committed fraud and he swore that he was a "musician" and later unemployed, that he was "financially impoverished" and insolvent, and that he had "no assets, no liquidity, no money in the bank, and no resources of any kind;" (4) the Hedge Funds were unaudited; (5) the Hedge Funds reported unusually high and consistently positive quarterly returns; and (6) the Hedge Funds' purported accountant was misidentified as a "CPA" (in reality, his license had been "null and void" since 1989) and had been subject to an investigation and a cease and desist order from Florida regulators for improperly identifying himself as a CPA.

[3] In response, the Receiver filed an Omnibus Opposition (the "**Omnibus Opposition**") (*see, e.g.*, *Wiand, as Receiver v. Roby*, Case No. 8:10-cv-71-T-17MAP (M.D. Fla.) (Doc. 24); the Declaration of Gianluca Morello in support of the Omnibus Opposition with a number of (footnote cont'd)

under purported "Subscription Agreements," "Limited Partnership Agreements," or "Limited Liability Company Agreements," as applicable (collectively, the "**Scheme Offering Documents**"). Those documents were used by Nadel and his so-called "business" partners, Neil and Christopher Moody (the "**Moodys**"), to purportedly sell equity interests in the Hedge Funds, but which, in reality, were used exclusively to raise money for the Ponzi scheme. While the Moodys were principals and named officers of certain Fund Managers, in actuality Nadel controlled all of the Fund Managers and Hedge Funds.

Despite Nadel's admission that each Hedge Fund was used from inception to perpetrate the scheme, on June 8, 2011, U.S. Magistrate Judge Mark A. Pizzo (the "**Magistrate Judge**") issued an Omnibus Report and Recommendation (the "**R&R**") recommending compelling arbitration of all of the Receiver's claims. *See, e.g.*, *Roby* (Doc. 41). As discussed in detail below, that recommendation is based on a number of errors and should be rejected for a number of independent reasons. But putting that to the side, the result reached by the R&R allows the papers at the heart of Nadel's scheme – the Scheme Offering Documents - to oust this Court's "complete jurisdiction and control" over Receivership property in favor of numerous separate private arbitrators in Florida, New York, and Illinois. Unquestionably, that result directly contradicts with the purpose of this Receivership, and as shown below, it is not supported by law or the facts.

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exhibits (the "**Morello Declaration**") (*see, e.g.*, *id.* (Doc. 25)); a Supplemental Omnibus Opposition (the "**Supplemental Opposition**") (*see, e.g.*, *id.* (Doc. 35); an opposition to the motion to compel in *Wiand, as Receiver v. World Opportunity Fund, L.P.*, Case No. 8:10-cv-203-T-17MAP (Doc. 29) (the "**WOF Opposition**"); and the Declaration of Gianluca Morello in support of the WOF Opposition with a number of exhibits (the "**WOF Morello Declaration**") (*see id.* (Doc. 30)).

THE RECEIVER'S OBJECTIONS

I. THE R&R DID NOT PROPERLY CONSIDER THE INHERENT CONFLICT BETWEEN ARBITRATION AND THE PURPOSE OF 28 U.S.C. §§ 754 AND 1692

As the R&R recognizes (R&R at 20), even when there is a contract with an arbitration clause, "legal constraints external to the parties' agreement [may] foreclose[] the arbitration of" claims under the FAA. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). One such "constraint" is a contrary congressional command. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). In relevant part, this congressional command may be "deducible . . . from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* at 227. Here, the congressional command which forecloses arbitration is deducible from the "inherent conflict" between arbitration, on the one hand, and the purpose of 28 U.S.C. §§ 754 and 1692 ("**Section 754**" and "**Section 1692**", respectively), on the other.

In analyzing whether arbitration inherently conflicts with the purpose underlying pertinent federal statutes, the R&R almost exclusively focuses on the Securities Act of 1933 and the Securities Exchange Act of 1934 (collectively, "**federal securities laws**"). R&R at 22. The Receiver's principal argument, however, is that arbitration is foreclosed by Sections 754 and 1692.[4] As discussed below, Sections 754 and 1692 display congressional intent to

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[4] In relevant part, the R&R (at page 22) characterizes the Receiver's argument as "rest[ing] on the notion that a securities enforcement action is the difference-maker here. Namely, the SEC's goals in enforcing the provisions of the Securities Act of 1933 and the Securities and Exchange Act of 1934, [the Receiver's] . . . role in that enforcement action, and the Court's role in supervising [the Receiver] . . . and overseeing the receivership estate
(footnote cont'd)

provide district courts overseeing receiverships with "complete jurisdiction and control" of Receivership property. Arbitration directly conflicts with that purpose because it divests courts of jurisdiction and control, and transfers control to arbitrators.

A. The R&R Incorrectly Characterizes Congressional Intent to Provide District Courts With "Complete Jurisdiction And Control" Of Matters Affecting Receivership Property

As previously noted, Sections 754 and 1692 display Congress's clear intent to provide district courts overseeing receiverships with "complete jurisdiction and control" of receivership property, whether already in the receiver's possession or in the hands of third parties, like the defendants here. Specifically, Section 754 authorizes federal district courts, through a receiver "in any civil proceeding involving property . . . situated in different districts," to assert "complete jurisdiction and control of all such property with the right to take possession thereof." 28 U.S.C. § 754. Similarly, Section 1692 authorizes service of

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all make arbitration inappropriate." The R&R adds, "the Supreme Court has rejected this argument by holding that actions for violations under these acts can be arbitrated." *Id.*

But as noted in the body, the "difference maker" is not the underlying securities enforcement action; it is Sections 754 and 1692, the statutes which deliberately conveyed to the Court authority to use its full inherent powers to recover, administer, and distribute receivership property. *See* Omnibus Opp'n at 23-29; Supp. Opp'n at 2-9. But in any event, the R&R fails to appreciate that neither *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), nor *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220 (1987), the U.S. Supreme Court decisions relied upon by it, "rejected" the Receiver's argument of conflict between arbitration of these cases and federal securities laws. Those Supreme Court cases considered arbitration of claims asserted by private parties, yet here the pertinent claims stem from an S.E.C. enforcement action. Further, *McMahon* permitted arbitration specifically because the S.E.C. had approved the relevant arbitration procedures. *See* 482 U.S. at 233-34 ("We conclude that where, as in this case, the prescribed procedures are subject to the [SEC's] § 19 authority, an arbitration agreement does not effect a waiver of the protections of the Act."). In contrast, the purported arbitration provisions the defendants rely upon did not trigger S.E.C. review or oversight.

process in any district in which Section 754 filings are made. 28 U.S.C. § 1692; *see S.E.C. v. Bilzerian,* 378 F.3d 1100, 1103 (D.C. Cir. 2004); *S.E.C. v. Vision Comm. Inc.,* 74 F.3d 287, 290 (D.C. Cir. 1996); *Haile v. Henderson Nat'l. Bank,* 657 F.2d 816, 823-24 (6th Cir. 1981). Congress enacted Sections 754 and 1692 "to facilitate judicial efficiency by permitting courts to manage claims regarding receivership property in a single forum." *Quilling v. Grand Street Trust*, 2005 WL 1983879, *2 (W.D.N.C. 2005); *Terry v. June,* 2003 WL 22125300, *5 (W.D. Va. 2003) ("substantial weight must be given to the congressional policy behind the authorization of nationwide service of process," which promotes judicial efficiency by consolidating claims concerning receivership property "in a single forum").

Recognizing Sections 754 and 1692's grant of jurisdiction and control to receivership courts, and consistent with the goal of adjudicating all matters affecting receivership property in one forum, receivership courts also have ancillary subject matter jurisdiction over every suit initiated by a receiver to implement the receiver's duties, irrespective of whether diversity, amount in controversy, or any other typical requirement for subject matter jurisdiction is satisfied. *See Haile*, 657 F.2d at 822. In the Waxenberg Receivership, the Honorable Mary S. Scriven explained that Sections 754 and 1692 "contemplate consolidated jurisdiction of ancillary cases within the [d]istrict [c]ourt in which the [r]eceivership is established." *See Wiand v. Schnall*, Case No. 8:06-cv-706-T-27MSS (M.D. Fla.), Apr. 12, 2007, Order at 6 (Doc. 49). These statutes further the goals of receiverships by allowing receivers to "marshal assets wherever they may be located." *Id.* The powers conveyed by Congress to receivers and district courts in Sections 754 and 1692 are based on "the need to recognize one locale – the locale of the [r]eceivership – as the proper venue to pursue claims

ancillary to the [r]eceivership." *Id.* at 7 (*citing Bilzerian*, 378 F.3d at 1107; *Haile*, 657 F.2d at 822 n.6; *Hodgson v. Gilmartin*, 2006 WL 2707397, *7 (E.D. Pa. 2006)).

These clawback cases fall squarely within the jurisdiction and control granted by Sections 754 and 1692 to this Court. Specifically, the Receiver asserts claims under Florida's Uniform Fraudulent Transfer Act, Fla. Stat. § 726.101 *et seq.* ("**FUFTA**") and, in the alternative, for unjust enrichment to recover money transferred from Nadel's Ponzi scheme to the defendants as purported principal redemptions or investment gains, and those claims seek recovery of property belonging to the Hedge Funds. *See Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 551 (Fla. 2d DCA 2003) (clawback claims are "actions that the corporation, which has been 'cleansed' through receivership, may bring directly against the principals or the recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation and taken prior to the receivership"); *In re Wiand R'ship Cases*, 2007 WL 963165, *7 (M.D. Fla. 2007) ("***Waxenberg I***") (noting that unjust enrichment claim seeking recovery of transfers of Ponzi scheme proceeds "may be properly categorized as an action directly against the principals or the recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation") (internal quotations omitted); *see also Knauer v. Jonathon Robert Fin. Group*, 348 F.3d 230, 231-36 (7th Cir. 2003) (distinguishing fraudulent claims "seeking to recover the diverted funds from the beneficiaries of the diversions" from claims seeking "tort damages from entities that derived no benefit from the embezzlements" and noting that, with respect to the former category, the law "favor[s] exceptional treatment of receivers"). The defendants hold that property in constructive trust for the Receiver, and he is entitled to recover it for the

benefit of the Receivership Estate. *See Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 250-51 (2000) ("Whenever the legal title to property is obtained through means or under circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired . . . and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder . . . .") (internal quotations omitted); *F.T.C. v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142 (9th Cir. 2010) ("Importantly, that a transferee was not 'the original wrongdoer' does not insulate him from liability for restitution."). Arbitration inherently conflicts with the purpose of Sections 754 and 1692 to consolidate in this Court all claims relating to Receivership property, because for a subset of those claims – those asserted against the defendants in these cases – it would divest the Court's jurisdiction and control in favor of private arbitrators in Illinois, New York, and Florida.

Significantly, sometimes (but not in these cases) receivers assert a second category of claims: "common law tort claims against third parties to recover damages in the name or shoes of the corporation for the fraud perpetrated by the corporation's insiders . . . ." *Freeman*, 865 So. 2d at 551. This second category of claims does not involve receivership property and is subject to greater limitations. *Id.* All but one of the cases cited by the defendants in briefing on the motions to compel in which receivers have been compelled to arbitrate involved these types of claims and not fraudulent transfer or unjust enrichment claims like those in these cases, or any other claim seeking recovery of receivership property. *See Javitch v. First Union Secs., Inc.*, 315 F.3d 619 (6th Cir. 2003); *U.S. Small Bus. Admin.*

v. Coqui Capital Mgmt., LLC, 2008 WL 4735234 (S.D.N.Y. 2008); *Capital Life Ins. Co. v. Gallagher*, 47 F.3d 1178 (10th Cir. 1995); *Phillips v. Lincoln Nat'l Health & Casualty Ins. Co.*, 774 F. Supp. 1297 (D. Col. 1991); *Moran v. U.S. Bank*, 2007 WL 1023447 (S.D. Ohio 2007). Only *Moran v. Svete*, 366 Fed. App'x 624 (6th Cir. 2010), involved a fraudulent transfer claim (and a number of "damages" claims), but there is no indication the court in that case considered any of the arguments made to the Magistrate Judge or in these objections.

B. The R&R's Conclusion Does Not Account For Section 754's Conferral To This Court Of "Control" Over Receivership Property, And Not Just "Complete Jurisdiction"

Aside from conferring "jurisdiction" over receivership property, Section 754 also confers "control." 28 U.S.C. § 754 (emphasis added). One of the "cannons of statutory construction" is that courts must "assume that Congress used the words in a statute as they are commonly and ordinarily understood" and "read the statute to give full effect to each of its provisions." *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). Further, "words in statutes should not be discarded as 'meaningless' and 'surplusage' when Congress specifically and expressly included them . . . ." *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). The R&R fails to consider the effect of the term "control" in Section 754 and instead only focuses on the Court's "jurisdiction."

"Control" means to "exercise dominating influence or authority over." Webster's II Dictionary (3d ed. 2005). Thus, Section 754 allows the Court to exercise authority over all Receivership property, including Receivership property possessed by the defendants. Arbitration interferes with that power as it divests the Court of the ability to exercise its authority over that property and to adjudicate the Receiver's claims to it. Further, inclusion

of the term "control" in Section 754 distinguishes that statute from other statutes that vest "exclusive jurisdiction" in a federal court but have been held not to foreclose arbitration. *See, e.g.*, *McMahon*, 482 U.S. at 227-28 (holding that § 27 of the Securities Exchange Act, which confers on federal district courts "exclusive jurisdiction" of violations of that Act, may be waived in favor of arbitration). Section 754's use of the term "control" has ramifications for the defendants' efforts to compel arbitration, yet the R&R fails to address them. Those ramifications require denial of arbitration.

C. The R&R Ignored This Court's Inherent Powers Give It Exclusive Jurisdiction Over These Cases And All Other Matters Affecting Receivership Property

Notably, this Court's jurisdiction and control over these cases and all other disputes involving receivership property is rendered exclusive by its inherent equitable powers, and those powers allow the Court to reject arbitration.[5] *S.E.C. v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) (courts have "broad powers and wide discretion to determine relief in an equity receivership"); *see* S.*E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) (same); *S.E.C. v. Safety Fin. Serv., Inc.,* 674 F.2d 368, 372-73 (5th Cir. 1982) ("Any action by a trial court in supervising an equity receivership is committed to his sound discretion and will not be disturbed unless there is a clear showing of abuse . . . ."). The R&R also failed to appreciate this.

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[5] This same discretion to reject arbitration is held by bankruptcy courts in similar circumstances. *See In re Brown*, 354 B.R. 591, 602-03 (Bankr. D.R.I. 2006) ("[W]here a conflict exists between the Bankruptcy Code and the FAA, a bankruptcy court retains discretion to decide whether and when to compel arbitration if the at-issue proceeding is core . . . .").

A court with "complete jurisdiction and control" over receivership property "may properly draw to itself all disputes as to other rights pertaining to such property because every court has inherent equitable power to prevent its own process from working injustice to anyone . . . ." *Consolidated Rail Corp. v. Fore River Ry. Co.*, 861 F.2d 322, 327 (1st Cir. 1988) (internal quotations omitted). Although Section 754 describes a receivership court's "jurisdiction and control" as "complete" instead of "exclusive," the court's broad inherent equitable powers allow it to make such jurisdiction exclusive by, for example, enjoining proceedings in other forums which affect receivership property. *See S.E.C. v. Wencke*, 622 F.2d 1363, 1370 (9th Cir. 1980) ("The power of a receivership court to prevent the commencement, prosecution, continuation, or enforcement of such [competing] actions has been recognized specifically in the context of securities fraud cases."); *Becker v. Greene*, 2009 WL 2948463, *4 (M.D. La. 2009) ("The Receiver and the Receivership Court's power to protect and marshal assets would be severely diminished if every court in the nation, state or federal, could make its own determination of what constitutes an asset of the 'Receivership Estate.'"); *S.E.C. v. Credit Bancorp, Ltd.*, 93 F. Supp. 2d 475, 476-77 (S.D.N.Y. 2000) ("[W]here a court has appointed a receiver and obtained jurisdiction over the receivership estate, as here, the power to stay competing actions falls within the court's inherent power to prevent interference with the administration of that estate.").[6]

For example, in *Eller Industries, Inc. v. Indian Motorcycle Manufacturing, Inc.*, 929 F. Supp. 369 (D. Col. 1995), a bankruptcy trustee obtained a preliminary injunction in

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[6] In light of federal courts' broad powers, Congress had no need to enact a comprehensive statutory scheme to govern federal equity receiverships like this one.

Massachusetts Bankruptcy Court against a company in receivership in a Colorado federal court. *Id.* at 371. The injunction attempted to place receivership assets in constructive trust for the benefit of the bankruptcy trustee, but the receivership court concluded it had "exclusive jurisdiction over the assets and administration of the [r]eceivership." *Id.* at 371-72. The court explained:

> Federal Courts have the power, if necessary, to take control over an entity and impose a receivership free from interference in other court proceedings. Upon imposition of a receivership, all property in the possession of the debtor passes into the custody of the receivership court, and becomes subject to its authority and control. In the exercise of its jurisdiction over the debtor's property, the court has power to issue injunctions and all other writs necessary to protect the estate from interference and to ensure its orderly administration.

Id. (citation omitted). The court noted the receivership's objective was to "prevent fraud and material injury to the assets of [the debtor] and to preserve them for all parties in interest" and stayed enforcement of the preliminary injunction. *Id.* at 373; *see Oppenheimer v. San Antonio Land & Irrigation Co.*, 246 F. 934, 935 (5th Cir. 1917) (district court with "complete jurisdiction and control" over receivership property "was not in error in restraining proceedings in another court involving the same subject-matter"); *Chicago Title & Trust Co. v. Fox Theatres Corp.*, 69 F.2d 60, 61 (2d Cir. 1934) ("Receivership court has jurisdiction to decide all questions of preservation, collection, and distribution of assets.").

Those powers confer to receivership courts like this one exclusive jurisdiction over matters affecting receivership property.[7] *See infra* Section I.E.; *Eller Indus.*, 929 F. Supp. at

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[7] Also included among those powers held by receivership courts is "discretion to summarily reject formalistic arguments that would otherwise be available in a traditional lawsuit." *Broadbent v. Advantage Software, Inc.*, 2011 WL 754838, *5 (10th Cir. 2011). Relying on these powers to achieve equity, receivership courts have rejected otherwise valid

(footnote cont'd)

372 ("This Court therefore has exclusive jurisdiction with respect to the administration, possession and control of [receivership] assets, and this control cannot be disturbed without leave of this Court.") (emphasis added); *Warfield v. Arpe*, 2007 WL 549467, *11 (N.D. Tex. 2007) ("receiver and his or her court of appointment have exclusive jurisdiction and control over receivership property" under Section 754 and, Section 1692 "helps to effectuate the appointing court's exclusive jurisdiction") (emphasis added); *Link v. Powell*, 57 F.2d 591, 594 (W.D.S.C. 1932) ("No law is more firmly settled than that the court having jurisdiction, both of the receivers and of the subject matter, has exclusive power to administer the entire estate and property.") (emphasis added).[8] The R&R, however, failed to recognize this, and it

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legal arguments in disputes involving receivership property, including arguments based on contract law. *See id.* (in administration of Ponzi scheme receivership, "it was proper for the district court to summarily reject appellants' . . . various contract law arguments in favor of treating appellants like all other similarly situated claimants"); *see also Holmberg v. Armbrecht,* 327 U.S. 392, 396 (1946) ("[S]tatutes of limitation are not controlling measures of equitable relief" because "[e]quity eschews mechanical rules; it depends on flexibility"); *United States v. Durham,* 86 F.3d 70, 73 (5th Cir. 1996) (although "tracing [of claimant's funds in receivership estate] would have been permissible under the circumstances," the district court "in exercising its discretionary authority in equity was not obliged to apply tracing"); *United States v. Vanguard Inv. Co.,* 6 F.3d 222, 227 (4th Cir. 1993) ("[A] district court in its discretionary supervision of an equitable receivership may deny remedies like rescission and restitution where the equities of the situation suggest such a denial would be appropriate . . . .").

[8] *See also Wencke*, 622 F.2d at 1370 ("The power of a receivership court to prevent the commencement, prosecution, continuation, or enforcement of such [competing] actions has been recognized specifically in the context of securities fraud cases."); *Becker*, 2009 WL 2948463 at *4 ("The Receiver and the Receivership Court's power to protect and marshal assets would be severely diminished if every court in the nation, state or federal, could make its own determination of what constitutes an asset of the 'Receivership Estate."); *Credit Bancorp*, 93 F. Supp. 2d at 476-77 ("[W]here a court has appointed a receiver and obtained jurisdiction over the receivership estate, as here, the power to stay competing actions falls within the court's inherent power to prevent interference with the administration of that estate.").

rejected the Receiver's argument that arbitration was foreclosed on its erroneous conclusion that Section 754 "merely grant[s] the receivership court complete but not exclusive jurisdiction." *See* R&R at 20.

D. This Court Already Exercised Its Exclusive Jurisdiction Over Receivership Property To Bar Other Proceedings

Notably, consistent with congressional intent, this Court already has exercised its inherent equitable powers to protect Receivership property by enjoining a state court case involving property held by third parties. *See S.E.C. v. Nadel*, Case No. 8:09-cv-00087-RAL-TBM (M.D. Fla.), Sept. 3, 2009, Order (Doc. 190) (the "***SEC Action***"). In that case, a defrauded investor sued the Moodys in state court and had a receiver appointed over certain personal property traceable to proceeds of the scheme. This Court enjoined that action, ordered turnover of the property to the Receiver, and held the Receiver's appointment conferred "constructive possession of all of the property that constitutes proceeds of the fraudulent scheme." *Id.* at 7. The Court explained that allowing the state court action to proceed would imperil the purpose of the Receivership, which is to "marshal the assets taken and used from the fraudulent scheme and distribute what can be obtained to the various investors." *Id.*

E. The R&R Disregarded The Legislative History Of Sections 754 And 1692, Which Reflects Congressional Intent To Vest This Court With Exclusive Jurisdiction And Control Over Receivership Property

The legislative history of Section 754 and 1692 shows the powers discussed above – including the power to reject arbitration – are precisely the powers Congress deliberately conferred to receivership courts and intended them to exercise. The R&R, however, failed to appreciate the legislative history.

Section 754 was enacted in 1948, but it re-codified an amended version of 28 U.S.C. § 117 ("**Section 117**"), which was enacted in 1911. *See* 28 U.S.C. § 754, Editor's and Revisor's Notes. Before 1911, a federal receiver could only reach property located within the district of the appointing court. *Link*, 57 F.2d at 593. This limitation hampered resolution of failed multi-district enterprises, such as railroads. *Id.* To increase receiverships' effectiveness, in 1911 Congress expanded the reach of federal receivers to encompass property located in all judicial districts within the appointing court's circuit. *See* Mar. 3, 1911, c. 231, § 56, 36 Stat. 1102. Quoting legislative history, *Link* explained that Section 117 – Section 754's predecessor – "applies to a case where a receiver is to be appointed by a district judge covering property that runs across an entire circuit and includes a great number of districts, and it provides that the action of the district judge sitting in one circumscribed district shall be conclusive in the appointment of a receiver . . . ." 57 F.2d at 593. The court observed that "[n]o law is more firmly settled than that the court having jurisdiction, both of the receivers and of the subject matter, has exclusive power to administer the entire estate and property." *Id.* at 594.

In re-codifying Section 117 as Section 754, Congress continued expanding the reach of receivers and receivership courts. "The revised section permits the receiver appointed by any district court to control all property of the defendant in whatever district the property is situated." 28 U.S.C. § 754, Editor's and Revisor's Notes. In first enacting Section 117 and later Section 754, Congress demonstrated a clear and deliberate desire to increasingly equip district courts and receivers with the power and jurisdiction to resolve in a single forum <u>all</u> matters relating to receivership property. Compelling arbitration of the cases here, as the

R&R recommends, which seek the return of receivership property, would require multiple proceedings in three jurisdictions, unnecessarily deplete Receivership assets, and directly conflict with Congress's demonstrated intent to allow this Court to resolve all disputes affecting receivership property, including the Receiver's clawback suits.

Significantly, the FAA is intended to "place[] arbitration agreements on equal footing with all other contracts" (*Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)) and explicitly contemplates foreclosure of arbitration on equity grounds (*see* 9 U.S.C. § 2 (arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract")). Accordingly, precluding arbitration here is not only consistent with congressional intent, but also with the plain language of the FAA and Supreme Court precedent.

F. Other Federal Statutes That Implement Procedures To Adjudicate Disputes Involving Property, Like Those In This And Other Federal Equity Receiverships, Have Been Found To Foreclose Arbitration

The R&R failed to address that arbitration has been found to "inherently conflict" with the purposes of other statutes that provide a centralized and efficient forum for addressing financial failures and, like in these cases, claims relating to property covered by the statutory scheme. Specifically, as discussed below, courts have concluded that arbitration conflicts with the purpose of bankruptcy laws and of the Federal Credit Union Act (the "**FCUA**"). Importantly, like Section 754 and 1692, those federal laws do not explicitly foreclose arbitration. Rather, courts have reached that conclusion based on an inherent conflict between arbitration and the purpose of those statutes.

As an initial matter, the R&R notes that *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1273 (11th Cir. 2002), observed that "[i]n every statutory right case that the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration." That observation, however, does not convey a full picture of pertinent circumstances for two reasons. First, as *Davis* qualifies, its pertinent statement is limited to cases considered by the Supreme Court and does not encompass cases considered by other federal courts. Notably, the cases considered by other courts that have resulted in a holding that arbitration was foreclosed by inherent conflict with the purpose of federal statutes involved statutes, like here, that did <u>not</u> explicitly foreclose arbitration. And significantly, those statutes, federal bankruptcy laws and the FCUA, have purposes that are substantively identical to the purpose of receiverships. Second, the Supreme Court has specifically held that Congress's intent to preclude arbitration may be deducible "from an inherent conflict between arbitration and the statute's underlying purposes," and that preclusion of arbitration does <u>not</u> have to be explicit in a statute's text. *McMahon*, 482 U.S. at 227.

1. Arbitration Inherently Conflicts With Bankruptcy Laws Because Of The Importance Of Centralized Adjudication Of Matters Affecting Property Of The Bankruptcy Estate

Courts have held that, under certain circumstances, arbitration inherently conflicts with bankruptcy statutes, thus foreclosing arbitration. "Congress intended to centralize disputes about a debtor's assets and legal obligations in the bankruptcy courts," and "[a]rbitration is inconsistent with centralized decision-making because permitting an arbitrator to decide a core issue would make debtor-creditor rights 'contingent upon an

arbitrator's ruling' rather than the ruling of the bankruptcy judge assigned to hear the debtor's case." *In re White Mountain Mining Co., LLC.*, 403 F.3d 164, 169 (4th Cir. 2005); *see In re Brown*, 354 B.R. at 602-03 ("[W]here a conflict exists between the Bankruptcy Code and the FAA, a bankruptcy court retains discretion to decide whether and when to compel arbitration if the at-issue proceeding is core . . . ."). As one court explained,

> [t]he enforcement of the arbitration agreement as to the present matters would force [the trustee] to litigate these matters in a distant forum and under unfamiliar rules, at appreciable expense to the estate and with considerable delay. If arbitration clauses were regularly enforced as to such routine bankruptcy matters, these clauses would soon multiply in ordinary consumer credit agreements, and trustees and debtors would consequently be forced to adjudicate routine bankruptcy matters in diverse fora in every case, with (for example) each objection to a claim being arbitrated in a different forum. This in turn would undermine a system that was designed precisely to avoid such dissipation of the parties' energies and the estate's resources.

In re Payton Const. Corp., 399 B.R. 352, 364 (Bankr. D. Mass. 2009); *see Ford Motor Co. v. Roberson*, 2010 WL 4286077, *3 (D. Md. 2010) (upholding bankruptcy court's refusal to compel arbitration of claims that would substantially interfere with Chapter 13 debtor's reorganization efforts).

To be clear, fraudulent transfer claims, like those brought by the Receiver here, are considered core issues under the bankruptcy laws. *See, e.g.*, 28 U.S.C. § 157(b)(2)(H) (fraudulent transfer claims are "core proceedings" in bankruptcy); *In re Gandy*, 299 F.3d 489, 496-97 (5th Cir. 2002) (same). Those claims arise from the receivership, and the Receiver can assert those claims only (1) because of his role as receiver and (2) because receivership "cleansed" the Hedge Funds. *See Waxenberg I*, 2007 WL 963165 at *6; *Scholes v. Lehmann*, 56 F.3d 750, 754-55 (7th Cir. 1995). Without receivership, neither the Receiver nor the Hedge Funds could have asserted the claims.

Broadly speaking, "[t]he goal in both securities-fraud receiverships and liquidation bankruptcy is identical – the fair distribution of the liquidated assets." *S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 334 (7th Cir. 2010). In light of this and other similarities between bankruptcies and receiverships (*see S.E.C. v. First Secs. Co. of Chicago*, 507 F.2d 417, 420 (7th Cir. 1974) (upholding district court's application of bankruptcy law to equity receivership); *S.E.C. v. Investors Secs. Leasing Corp.*, 476 F. Supp. 837, 842 (W.D. Pa. 1979) (same); *In re Franklin Mortg. & Inv. Co., Inc.*, 144 B.R. 194, 194 (Bankr. D.D.C. 1992) ("The Bankruptcy Code does not authorize receivers, but the case is analogous to a receivership action.")), the concerns with arbitration expressed in *Payton Construction* and other bankruptcy cases are equally relevant to this and other receiverships. If the Receiver is compelled to arbitrate, arbitration would "substantially interfere[]" with this Court's complete jurisdiction and control over Receivership property and its ability "to decide all questions of preservation, collection, and distribution of assets" (*see Chicago Title*, 69 F.2d at 61), and the goals of receivership – to marshal, liquidate, and fairly distribute assets – would be significantly impaired through the "dissipation of the parties' energies and the estate's resources" (*see Payton Const.*, 399 B.R. at 364). The R&R fails to address the strong similarities between bankruptcy and receivership matters.

2. Arbitration Inherently Conflicts With The Federal Credit Union Act Also Because Of The Importance Of Centralized Adjudication Of Disputes Relating To Property

The FCUA is similar to receiverships and bankruptcies because it is a "comprehensive scheme designed to protect the interests of creditors of defunct federal credit unions." *National Credit Union Admin. Board v. Lormet Comm. Fed. Credit Union*, 2010

WL 4806794, *2 (N.D. Ohio 2010). Congress vested the National Credit Union Administration Board ("**NCUAB**") with authority to administer and adjudicate all claims against failed credit unions, and the procedures the NCUAB uses to wind down defunct credit unions are similar to those employed in equity receiverships. *See id.*; 12 U.S.C. §§ 1787(b)(3), (b)(5)(A)(i). Claims within the scope of the FCUA are not arbitrable because of an inherent conflict with arbitration. *Lormet Comm. Fed. Credit Union*, 2010 WL 4806794 at *4; *see McMahon,* 482 U.S. at 227; *Mitsubishi Motors,* 473 U.S. at 627-28. As *Lormet Comm. Fed. Credit Union* explained,

> [T]here is an inherent conflict between the FAA and the FCUA. As plaintiff points out, the FCUA . . . is designed to protect creditors of defunct federal credit unions [and includes] . . . a detailed administrative claims procedure, pursuant to which all creditors must submit claims. The purpose of the statute is to afford plaintiff, an arm of the executive branch of the government, with the ability to assess and quickly disburse the funds due to creditors of a defunct federal credit union. To that end, the statute precludes judicial review until after the administrative claims procedure is complete. Presumably, this enables plaintiff to assess the credit union's assets and fairly distribute any existing assets to the creditors. At the same time, the administrative claims process provides a centralized system for addressing claims so that whatever assets may remain can be preserved for the benefit of all creditors. The Court finds an inherent conflict in this statutory scheme which operates to benefit all creditors, with the FAA which would essentially serve to place the rights of creditors who have agreements containing arbitration provisions on different footing than those unable to rely on arbitration provisions. In addition, requiring plaintiff to defend creditor claims in arbitration would defeat a primary purpose of the statute, *i.e.*, centralizing the claims process and preserving the limited assets of the defunct credit union.

2010 WL 4806794 at *4.

Significantly, those dispositive factors are present here. Like the NCUAB, the Receiver operates as an arm of a branch of the federal government, specifically of this Court, tasked with marshaling and preserving assets of defunct entities for the benefit of all

creditors. *See Booth v. Clark*, 58 U.S. 322, 331 (1854) (receiver "is but the creature of the court"); *Bull v. Int'l Power Co.*, 98 A. 382, 383 (N.J. Eq. 1916) (receiver operates as "hand" of the court). This Receivership instituted a comprehensive claims procedure orchestrated by the Receiver under the Court's supervision and ultimate authority, and all creditor claims had to be submitted in accordance with that process. *See SEC Action*, Apr. 21, 2010, Order at 1-2 (Doc. 391). Like the FCUA, arbitration conflicts with statutes conveying authority to the Receiver and this Court because it would undermine the centralized resolution of disputes involving receivership property and remove some of that property from the Court's complete control. Despite the parallels between this receivership and the FCUA that are pertinent to whether the Receiver's claims must be arbitrated, the R&R failed to address the FCUA's foreclosure of arbitration.

G. The R&R Improperly Focused Exclusively On One Purpose Of Receivership, The Disposition Of Receivership Property, And Failed To Appreciate Other Important Purposes, Including Marshalling And Preserving Receivership Property

Another fundamental error in the R&R which undermines its conclusion that arbitration is not foreclosed is its incomplete characterization of this and other federal equity receiverships' purpose as "ensur[ing] the proposed plan of distribution is fair and reasonable." R&R at 22 (quoting *Wealth Mgmt.*, 628 F.3d at 332). Based on that incomplete characterization, the R&R concludes the Receiver could "vindicate his mandate" through arbitration because he "must still answer to the district judge in the enforcement action, who will ensure that the proposed plan of distribution is fair, reasonable, and in keeping with the enforcement action's goals." R&R at 23.

But the R&R ignores the purpose of receiverships is not limited to ensuring equitable distribution of receivership assets; it is also to gather and marshal assets that belong to the receivership estate and to administer them pending receivership. *SEC Action*, Sept. 3, 2009, Order at 7 (Doc. 190) (one of this Receivership's purposes is to "marshal the assets taken and used from the fraudulent scheme"); *United States v. Setser*, 568 F.3d 482, 488 (5th Cir. 2009) (noting that "seizure of all assets on behalf of the court is a central purpose for the appointment of a receiver."); *Wiand v. Schnall*, Case No. 8:06-cv-706-T-27MSS (M.D. Fla.), Apr. 12, 2007, Order at 6 (Doc. 49) (goals of receivership include "marshal[ing] assets wherever they may be located"); *Chicago Title*, 69 F.2d at 61 ("The appointment of an equity receiver of the property of a debtor corporation draws to the appointing court jurisdiction to decide all questions of the preservation, collection, and distribution of its assets.") (emphasis added). Indeed, the Court directed this Receiver to, *inter alia*, marshal and safeguard all Hedge Funds' assets and take whatever actions necessary for the protection of the investors, including instituting legal proceedings against individuals or entities that have wrongfully or improperly received funds or other proceeds directly or indirectly traceable from investors in the Hedge Funds. *See Roby* Compl. ¶ 5; *SEC Action*, Order Appointing Receiver (Doc. 8).

As discussed above in Section I.A., these clawback cases fall squarely within this Receivership's purpose to marshal assets that belong to the Receivership Estate. Arbitration threatens those efforts and subjects them to increased costs, which ultimately further injures investors who, unlike each of the defendants, did not receive false profits from Nadel's Ponzi scheme. *See Vescor Capital*, 599 F.3d at 1194 ("[I]n a case involving a Ponzi scheme, the interests of the [r]eceiver are very broad and include not only protection of the receivership

res, but also protection of defrauded investors and considerations of judicial economy."); *United States v. Acorn Technology Fund, L.P.*, 429 F.3d 438, 443 (3rd Cir. 2005) (same); *S.E.C. v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985) (same). When the full scope of the Receivership's purpose is considered arbitration inherently conflicts with the purpose of Sections 754 and 1692.[9]

II. THE R&R DID NOT PROPERLY CONSIDER THE FUND MANAGERS LACKED AUTHORITY TO BIND THE HEDGE FUNDS

The Receiver asserted several arguments which challenged the existence of any contract purportedly reflected by the Scheme Offering Documents (*i.e.*, a challenge premised on argument that no contract was ever concluded) rather than the validity of any such contract (*i.e.*, a challenge premised on argument that a contract was concluded, but that it is

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[9] Nothing about arbitration is consistent with the goals of receivership. It would neither conserve receivership resources, allow the Court to exercise its congressionally-conferred jurisdiction and control, treat all similarly-situated investors equally, nor protect defrauded investors. To the contrary, it would be significantly more expensive than proceeding in Court; it divests the Court of jurisdiction and control over receivership property possessed by defendants; it would allow the defendants to litigate this matter in their preferred forum to the exclusion of this Court's jurisdiction and control; and it would leave this Receivership and defrauded investors to the whims of private arbitrators. Arbitration would involve filing at least 28 arbitration demands spread across Illinois, New York, and Florida, and would subject each case to separate arbitrators who could render inconsistent decisions. Although the R&R recognizes arbitration of these cases would deplete the receivership estate by approximately $100,000 in administrative fees (*see* R&R at 23), it ignores that estimate does not include one-half of the hourly fees of at least 28 arbitrators the Receiver would also have to pay from receivership assets. Although the R&R characterizes this estimate as "just a guess," it is nevertheless an educated estimate based on published fee schedules and experience.

invalid and thus unenforceable).[10] Among those arguments was a challenge based on the Fund Managers' lack of authority to execute the Scheme Offering Documents on behalf of the Hedge Funds.[11] *See Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 111 (3d Cir. 2000); *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 300 F. Supp. 2d 606, 629 (N.D. Ill. 2003); *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co. Inc.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991). The legal analysis for resolving challenges to the existence of a purported contract with an arbitration provision is materially different than the analysis for resolving challenges to such a purported contract's validity.

The R&R, however, fails to meaningfully recognize the Receiver's challenge to contract existence, and instead refers to it as a challenge to contract validity. *See, e.g.*, R&R at 6 (describing Receiver's argument as, "Defendants cannot show the agreements are valid"); 6-7 (failing to appreciate that Receiver's challenge to contract existence implicates threshold question of whether parties agreed to arbitrate dispute); 9 (Receiver "attacks validity of the Defendants' proffered agreements"); 25 ("No party seriously disputes the existence of these agreements."). Indeed, in reference to the Scheme Offering Documents, the R&R states, the Receiver "does not deny the existence of the agreements. Rather, he

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[10] *See Fla. Farm. Bureau Ins. Cos. v. Pulte Home Corp.*, 2005 WL 1345779, *3 (M.D. Fla. 2005) (one matter court must consider when deciding arbitrability is whether a valid written agreement to arbitrate exists).

[11] The Receiver's other arguments for why a contract never came into existence were: (1) that the Hedge Funds and the defendants never reached the requisite mutual assent (*i.e.*, there was no "meeting of the minds") and (2) that the Fund Managers' acts in purporting to bind the Hedge Funds to the Scheme Offering Documents were *ultra vires*. *See* Omnibus Opp'n at 6-8, 10-12. The R&R also incorrectly rejected these arguments. *See* R&R at 12.

attacks their legality." R&R at 9. As is clear from the Receiver's submissions opposing the motions to compel and from these objections, that statement is plainly wrong. As a result of the R&R's failure to correctly identify the nature of the Receiver's challenge, the R&R applied the wrong legal standard.

In relevant part, the Receiver argued the defendants could not show any of the Scheme Offering Documents reflected a contract that came into existence because the Fund Managers, who purported to execute those documents on behalf of the Hedge Funds, were acting adversely to the Hedge Funds' interests and thus could not bind them. *See* Omnibus Opp'n at 8-10. The R&R rejected this argument because, it stated, (1) the Receiver placed "too demanding a burden" on the defendants to show the existence of a contract requiring arbitration and (2) the Receiver's argument challenged the "validity" of the Scheme Offering Documents as a whole and not merely their arbitration clauses. *See* R&R at 10. These reasons, however, are wrong because (1) the Receiver's challenge raised a question of contract existence and not contract validity, and (2) the Receiver raised a "genuine issue" by unequivocally denying the existence of an agreement with an arbitration provision and submitting an appropriate amount of substantiating evidence.

A. The R&R Erred Because The Scheme Offering Documents Do Not Reflect A "Contract" That Came Into Existence

As mentioned above, in relevant part the Receiver's challenge to contract existence was based on the Fund Managers' lack of authority to bind the Hedge Funds to contracts with the defendants and all other investors. *See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 55 (3d Cir. 1980) ("If the production manager did not have the actual or apparent authority to execute the contract, the corporation cannot be bound, no matter how

clearly the document was labeled."); *Sandvik*, 220 F.3d at 111; *Sphere Drake*, 300 F. Supp. 2d at 629. They could not bind the Hedge Funds because an agent may only act for the benefit of the principal. Restatement (Second) of Agency § 396(b); *Apollo Techs. Corp. v. Centrosphere Indus. Corp.*, 805 F. Supp. 1157, 1195 (D.N.J. 1992). An agent's authority to act in that capacity is terminated when the agent ceases to act for the benefit of the principal and instead acts for its own benefit. *Id.* at 1197. Consequently, the conduct of an agent cannot be imputed to, and therefore bind, a principal when the agent is acting entirely in its own interests and adversely to the interests of the principal. *See In re Phoenix Diversified Inv. Corp.*, 439 B.R. 231, 242 (S.D. Fla. 2010) (when "agent's misconduct is calculated to benefit the agent and harms the corporation, the agent has forsaken the corporation and acts only for himself"); *LanChile Airlines v. Conn. Gen. Life Ins. Co. of N. Am.*, 759 F. Supp. 811, 814 (S.D. Fla. 1991) ("[K]nowledge and misconduct of an agent will not be imputed to a principal if an agent is secretly . . . acting adversely to the principal and entirely for his own or another's purposes."); *see also Munroe v. Harriman*, 85 F.2d 493, 495 (2d Cir. 1936) ("The truth is that where an agent, though ostensibly acting in the business of the principal, is really committing a fraud, for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it."); *Freeman*, 865 So. 2d at 550 ("sins" of agent do not "transfer to the corporation").

In relevant part, in purporting to enter into contracts on behalf of Hedge Funds with investors, the Fund Managers were acting adversely to the Hedge Funds' interests because the Scheme Offering Documents were being used exclusively to draw investors into Nadel's

Ponzi scheme.[12] Nadel faced criminal charges for perpetrating that scheme, for which he is now serving 14 years' imprisonment. *See United States v. Arthur G. Nadel*, Case No. 09-cr-433 (S.D.N.Y.) (the "***Criminal Action***"), Indictment (the "**Indictment**"), attached as Exhibit 3 to Morello Declaration. On February 24, 2010, he pled guilty (*see* Morello Decl., Ex. 2) to all counts in his Indictment, thus admitting that beginning in 1999 (when the first Hedge Fund, Valhalla, was established) and continuing until January 2009 (when the scheme collapsed), Nadel used each of the Hedge Funds to perpetrate his Ponzi scheme. *See, e.g.*, Indictment ¶ 8; *McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[A] guilty plea is an admission of all the elements of a formal criminal charge"); *United States v. Kimble*, 139 Fed. Appx. 221, 225 (11th Cir. 2005) ("[T]he time-honored rubric that a plea of guilty is a judicial admission of the truth of the factual allegations of the indictment . . . ."); *In re Rothstein Rosenfeldt Adler,* 2010 WL 5173796, *5 (S.D. Fla. 2010) (when Ponzi scheme operator pled guilty to information, "he admitted to each and every allegation contained therein"); *In re McCarn's Allstate Fin., Inc.*, 326 B.R. 843, 851 (Bankr. M.D. Fla. 2005) (Ponzi scheme operator "admitted and pleaded guilty to all the allegations in the

[12] Although under Florida law the adverse interest exception to imputation may not apply under certain circumstances when the principal is simply the alter ego of the dishonest agent, it always applies in instances like here for two independent reasons: first, because the principal (Hedge Fund) has innocent stakeholders (the investors); and second, because the claims in this and the rest of the clawback cases are for recovery of transfers from a Ponzi scheme under FUFTA and unjust enrichment and are not tort damages claims. *See, e.g.*, *Freeman*, 865 So. 2d at 550-51 (distinguishing between claims asserted by a receiver to recover fraudulent transfers and common law tort claims for damages against third parties, and noting that with respect to the former, the "sins" of an agent do not transfer to the corporation).

Information"). In other words, from their inception, the Hedge Funds were exclusively used to perpetrate the scheme.

Although Nadel was only the principal and named manager of the Victory Fund Manager and the Scoop Fund Manager, in reality, as alleged in the complaints, Nadel controlled all Fund Managers (*see, e.g.*, *Roby* Compl. ¶¶ 60, 63, 65, 66, 69-73, 75-78 (Doc 1)). Nadel, through the Fund Managers, purported to enter into Scheme Offering Documents with each defendant to raise additional money for his scheme. Those actions, however, harmed, and were thus adverse to, the Hedge Funds' interests and consequently could not bind the Hedge Funds. *See Scholes,* 56 F.3d at 754 ("The corporations, [the Ponzi operator's] robotic tools, were nevertheless in the eyes of the law separate legal entities with rights and duties."); *Grand St. Trust*, 2005 WL 1983879 at *5 ("When these funds were fraudulently transferred, [the receivership entity] was damaged due to the loss of these funds."); *Marwil v. Farah*, 2003 WL 23095657 *7 (S.D. Ind. 2003) (noting that the receivership entity "itself has suffered an injury"). Indeed, on the same day the R&R was issued, the Magistrate Judge entered a report and recommendation on a motion for summary judgment in another clawback case finding, "[i]t is beyond dispute that Nadel was acting adversely to the interests of the receivership entities." *See Wiand, as Receiver v. Boshart*, Case No. 8:10-cv-74-T-17MAP, Report & Recommendation at 4 (Doc. 35).

And even assuming the two fund managers whose principals and official (but not *de facto*) managers were the Moodys (*i.e.*, Valhalla Fund Manager and Viking Fund Manager) were not controlled by Nadel, they still acted adversely to Hedge Funds' interests because (1) those Fund Managers nevertheless were purporting to enter into Scheme Offering Documents

solely to allow Nadel's scheme to continue and (2) the Moodys were also culpable as they were charged by the S.E.C. for engaging in securities fraud in connection with the scheme, and entered into consent judgments. *S.E.C. v. N. Moody et al.*, Case No. 8:10-cv-53-T-26TBM (M.D. Fla.) (the "***Moody Action***"), Judgment Of Permanent Injunction (Docs. 9, 9-1). In short, the Fund Managers' actions in purporting to create contracts between the Hedge Funds and the defendants reflected by the Scheme Offering Documents could not be imputed to the Hedge Funds, and thus those documents did not reflect any contract between any Hedge Fund and any defendant.[13]

B. The R&R Incorrectly Concluded The Fund Managers' Authority To Bind The Hedge Funds Implicates Contract Validity Rather Than Contract Existence

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the Court considered a challenge to the validity of a contract with an arbitration clause and concluded that challenge should be decided by an arbitrator. More recently, in *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440 (2006), the Court affirmed *Prima Paint.* Importantly,

[13] Referring to this argument, the R&R states the Receiver "cannot as the Hedge Funds' representative assert the existence of the Hedge Funds, yet deny the existence of the organizational documents." R&R at 11 (internal quotations omitted). This statement, however, does not appreciate applicable facts and law. The "organizational documents" that created the Hedge Funds (*i.e.*, the pertinent entities the Receiver represents) were certificates of incorporation filed with state authorities, and those documents had nothing to do with investors. The Scheme Offering Documents did not seek to create anything; rather, they merely purported to sell equity interests in the Hedge Funds to raise capital. That those documents did not reflect an actual contract does not mean the defendants did not purchase interests in the Hedge Funds or invest in a common enterprise. They did, and they acquired legal rights and remedies by purchasing those interests, but those rights and remedies are dictated by common and statutory law and not by the Scheme Offering Documents.

Buckeye distinguished challenges to a contract's validity from challenges to its existence.[14]

The Court noted:

> [t]he issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, *Chastain v. Robinson-Humphrey Co.,* 957 F.2d 851 (11th Cir. 1992); whether the signor lacked authority to commit the alleged principal, *Sandvik AB v. Advent Int'l Corp.,* 220 F.3d 99 (3d Cir. 2000); *Sphere Drake Ins. Ltd. v. All American Ins. Co.,* 256 F.3d 587 (7th Cir. 2001); and whether the signor lacked the mental capacity to assent, *Spahr v. Secco,* 330 F.3d 1266 (10th Cir. 2003).

Id. at 449 n.1; *see Granite Rock Co. v. Int'l Broth. Of Teamsters*, 130 S. Ct. 2847, 2855-58 (2010) (court, not arbitrator, decides challenge to formation of purported contract with arbitration clause); *see also Dedon GmbH v. Janus et Cie*, 2011 WL 31868, *2 (2d Cir. 2011) ("*Granite Rock* reconfirms . . . that where a party challenges the very existence of the contract containing an arbitration clause, a court cannot compel arbitration without first resolving the issue of the contracts existence."); *Composition Roofers Local 4 Pension Fund v. Best Roofing of N.J., Inc.*, 2009 WL 5033945, *2 (D.N.J. 2009) ("[T]he qualification provided by the footnote [in *Buckeye*] is crucial: disputes over 'whether the alleged obligor ever signed the contract . . . [or] whether the signor lacked authority to commit the alleged principal' are *not* disputes over contract validity, within the meaning of *Buckeye.* Rather, they

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[14] Sometimes there is a "fine distinction" between a challenge to a contract's validity and a challenge to a contract's existence, and it will "occasionally be elusive." *See e.g., Will-Drill Resources, Inc. v. Samson Resources Co.*, 352 F. 3d 211 (5th Cir. 2003). However, as the cases cited by the Receiver here and in the Omnibus Opposition show, the Receiver unquestionably has challenged the purported contract's existence.

are disputes over whether any agreement was ever concluded, which is an issue for the courts to decide, not the arbitrator.").

Before *Buckeye* and *Granite Rock*, but consistent with them, the Eleventh Circuit held that when a party challenges "the very existence of any agreement, . . . there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the [Federal Arbitration] Act." *Chastain*, 957 F.2d at 854. The court observed that "*Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract never existed at all." *Id.* at 855.[15] That is precisely the Receiver's contention here. As such, a party against whom arbitration is sought, like the Receiver, may challenge the authority of a purported agent to enter into a contract as a whole, rather than the particular arbitration provision. *See Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir. 2002) (recognizing that *Sandvik*, *Sphere Drake*, and *Three Valleys* all involve "questions of assent to the general contract").

Here, in relevant part, the Receiver argued the defendants could not show the existence of a contract because the Fund Managers were acting adversely to the interests of their purported principals, the Hedge Funds, and thus could not bind the Hedge Funds to the Scheme Offering Documents. The R&R, however, concludes the Receiver's argument impermissibly challenged the "validity" of the Scheme Offering Documents as a whole (*see* R&R at 10). Further, the R&R concludes, "[b]ecause Wiand's challenges go to the legal

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[15] *See also Krutchik v. Chase Bank USA, N.A.*, 531 F. Supp. 2d 1359, 1363 (S.D. Fla. 2008); *Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007); *Gregory v. Interstate/Johnson Lane Corp.*, 1999 WL 674765, *9 (4th Cir. 1999); *Will-Drill Resources, Inc.*, 352 F.3d at 219.

formation of the agreements, they are for the arbitrators to consider." R&R at 13. Those conclusions are wrong because the Receiver's argument was plainly one of existence because "[i]f [an agent's] signature is not binding, there is no arbitration clause." *Sandvik*, 220 F.3d at 108; *see also Composition Roofers*, 2009 WL 5033945 at *2 (whether signor lacked authority to commit alleged principal is *not* a dispute over contract validity). Also, as set forth by the United States Supreme Court, courts – not arbitrators – must decide challenges to the formation of the contract, like the Receiver's challenge here. *Granite Rock Co.*, 130 S. Ct. at 2855-58. Simply put, the R&R fails to appreciate the significance of the footnote in *Buckeye*, and incorrectly categorizes the Receiver's arguments as a challenge to validity of the purported contact. *See Composition Roofers*, 2009 WL 5033945 at *2.

C. The R&R Improperly Applied The "National Policy" Favoring Arbitration To The Receiver's Challenge To Contract Existence

By failing to properly recognize the Receiver challenged contract existence instead of contract validity, the R&R overbroadly applied the "'national policy' . . . favoring arbitration agreements." R&R at 5, 6. Although courts ubiquitously note that arbitrability is reviewed under a legal paradigm reflecting such a "policy," that "policy" does not apply to challenges to the existence of a contract with an arbitration provision. As the Eleventh Circuit observed,

> Because arbitration is a matter of contract, . . . the FAA's strong proarbitration policy only applies to disputes that the parties have agreed to arbitrate. In the absence of an agreement to arbitrate, a court cannot compel the parties to settle their dispute in an arbitral forum.

Klay v. All Defs., 389 F.3d 1191, 1200 (11th Cir. 2004) (internal citations omitted); *see Granite Rock Co.*, 130 S. Ct. at 2859 (Supreme Court has "never held" that federal policy favoring arbitration "overrides the principle that a court may submit to arbitration only those

disputes . . . the parties have agreed to submit" (internal quotations omitted)). Yet, here the R&R applied it and thus committed error. *See* R&R at 6 (stating that court looks at "question" of whether "parties agree[d] to arbitrate the particular dispute at issue . . . with a distinct perspective – a healthy respect for the 'national policy' favoring arbitration . . . .").

D. The R&R Incorrectly Concludes That Defendants Satisfied Their Burden Of Showing The Scheme Offering Documents Reflected A Contract That Came Into Existence

Parties seeking to compel arbitration (here, the defendants) bear the burden of proving the existence of an agreement to arbitrate. *Schoendorf v. Toyota of Orlando,* 2009 WL 1075991, *7 (M.D. Fla. 2009).[16] Although the burden remains with the party seeking to arbitrate,[17] the party opposing arbitration (here, the Receiver) must (1) unequivocally deny

[16] The R&R improperly discounts *Schoendorf* and notes that case should be read in light of its "narrow factual pattern." R&R at 8-9, n.13. But the facts of *Schoendorf* and *Chastain* are very similar, and the considerations in those cases are identical to those here. Both those cases concerned whether an agreement to arbitrate came into existence in light of contentions that plaintiff did not sign one, and like here, the relevant issue was whether any contract with an arbitration provision ever came into existence. *Schoendorf* properly recognized each party's obligations when faced with a challenge to the very existence of the purported contract with an arbitration provision, noting the party seeking arbitration has the burden to establish the existence of an agreement to arbitrate, and the party opposing arbitration must deny existence of that agreement and submit some evidence to substantiate the denial. *Schoendorf* is entirely consistent with *Chastain,* and there is no reason to limit its application.

[17] As *Schoendorf* explained,

> To prove the existence of a contract under Florida law, the party seeking to enforce the contract must prove offer, acceptance, consideration and sufficient specification of essential terms. The proponent of the contract must prove these elements by a preponderance of the evidence. When one party is seeking to enforce a challenged agreement to arbitrate, the [party] who should lose on the issue of an agreement to arbitrate is the one who failed to carry its burden of proving an acceptance of arbitration as a contractual remedy.

(footnote cont'd)

the agreement was made and (2) produce "some evidence" substantiating the denial. *Chastain,* 957 F.2d at 854 (citing *T&R Enters. v. Continental Grain Co.*, 613 F. 2d 1272, 1278 (5th Cir. 1980). The R&R misapplied both burdens.

First, the R&R incorrectly finds the defendants satisfied their burden of proving the existence of an agreement to arbitrate because, as explained above, the R&R mischaracterizes the Receiver's argument regarding the authority of the Fund Managers to bind the Hedge Funds as one of validity rather than existence. *See* R&R at 9-10. In truth, the defendants did not prove the Fund Managers had authority to bind the Hedge Funds, and thus they did not prove existence of an agreement to arbitrate between the defendants and the Hedge Funds.

Second, the R&R incorrectly finds the Receiver failed to satisfy his burden of producing "some evidence" substantiating his denial that any contract with an arbitration provision between the Hedge Funds and the defendants ever came into existence. *See* R&R at 10. In truth, the Receiver submitted more than the requisite "some evidence," by filing true and correct copies of Nadel's Indictment and his plea agreement and by referencing specific documents in the SEC enforcement action against Nadel and the one against the Moodys. *See* Omnibus Opp'n at 12-16; Morello Decl. Exs. 2, 3. The Receiver also discussed the preclusive effect of Nadel's guilty plea and how that plea operated as an admission of every allegation in the Indictment. *See* Omnibus Opp'n at 15-16. Collectively, those items provided much more than just "some evidence" that the Scheme Offering

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2009 WL 1075991 at *6 (internal quotations and citations omitted).

Documents did not reflect any contracts that came into existence because the Fund Managers purported to enter into them with investors on behalf of the Hedge Funds solely so Nadel could perpetrate and perpetuate his Ponzi scheme.

1. The R&R Incorrectly Concludes The Defendants Satisfied Their Initial Burden

As noted above, the defendants bore the burden of proving the existence of an agreement to arbitrate. *Schoendorf*, 2009 WL 1075991 at *7. The R&R incorrectly concludes the defendants satisfied this burden by producing "presumptively valid" Scheme Offering Documents. In reaching this conclusion, the R&R relied on a passage in *Chastain* which contrasted the facts in that case with those in most arbitrability disputes:

> Under normal circumstances, an arbitration provision within a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration. Under such circumstances, the parties have at least presumptively agreed to arbitrate any disputes, including those disputes about the validity of the contract in general. Because the making of the arbitration agreement itself is rarely in issue when the parties have signed a contract containing an arbitration provision, the district court usually must compel arbitration immediately after one of the contractual parties so requests.

957 F. 2d at 854. These cases, like *Chastain*, present one of those atypical instances where "the making of the arbitration agreement itself" is an issue because the Receiver asserted (with supporting evidence) the Fund Managers did not have authority to bind the Hedge Funds to the Scheme Offering Documents, so no contract with an arbitration provision between the defendants and the Hedge Funds ever came into existence.

The R&R's observation that these cases involve the "normal circumstances" identified in *Chastain* is simply incorrect. *Compare* R&R at 10 (citing *Bess*, 294 F.3d at 1305-06, to find that "plaintiff challenges the content of the contracts and not their existence;

thus, 'case falls within the 'normal circumstances' described in *Chastain*, where the parties have signed a presumptively valid agreement to arbitrated any disputes . . . .") *with Chastain*, 957 F.2d at 854 (the "calculus changes" when a party challenges the "very existence of any agreement, including the existence of an agreement to arbitrate"). The relevant facts of these cases are substantively similar to those in *Chastain. Chastain* involved physically-existing documents with arbitration clauses which purported to bind the plaintiff, but the plaintiff claimed they did not reflect any contract between her and the defendant. *See Chastain,* 957 F.2d at 854. Similarly, here the defendants produced physical copies of the Scheme Offering Documents, but their burden requires that and more. The defendants must also show those documents came into existence as contracts. For purposes of arbitrability, there is no distinction between circumstances in which a party forges another's signature (as in *Chastain*) and circumstances in which an agent without appropriate authority purports to enter into an agreement on behalf of its principal (as here) – in both circumstances, no contract ever comes into existence. *See Sandvik,* 220 F.3d at 107 ("[because] under [ ] the FAA a court must decide whether an agreement to arbitrate exists before it may order arbitration, the District Court was correct in determining that it must decide whether [the agent's] signature bound Advent before it could order arbitration.") The defendants did not satisfy their burden because they failed to show the Fund Managers had authority to bind the Hedge Funds to the purported Scheme Offering Documents.

2. The R&R Fails To Recognize The Receiver Raised a Genuine Issue About Contract Existence And Submitted Sufficient Evidence To Support It

Again relying on *Chastain*, the R&R concludes the Receiver "fail[ed] to offer the requisite factual affidavits countering the presumptive record." R&R at 11. In reaching that conclusion it necessarily found the "presumptive record" included that the Scheme Offering Documents reflected contracts between Hedge Funds and defendants that came into existence, and the Receiver failed to satisfy his burden of showing "some evidence" substantiating his denial. *Id.* That conclusion, however, (1) misapplies *Chastain* and (2) disregards both the substance of the Receiver's proof (which consisted, in relevant part, of Nadel's Indictment, his guilty plea, and the records of the S.E.C. enforcement actions against Nadel and the Moodys) and its legal and factual ramifications. While the R&R focuses on "factual affidavits," in reality, there is no better evidence than the admissions of the perpetrator underlying the scheme at issue.[18]

[18] Indeed, given the extensive record before the Court regarding Nadel's use of the Fund Managers to operate a Ponzi scheme, it is unclear what additional "factual affidavits" (see R&R at 11) the Receiver could have provided in addition to the Morello Declaration and the documents attached thereto, the binding admissions of Nadel, and the records in the *SEC Action* and in the *Moody Action*, of which this Court may take judicial notice. This is particularly true because the Receiver, as a third-party outsider to the fraudulent transactions, only has second-hand knowledge of fraudulent acts involving Nadel, the Hedge Funds, and the defendants. *Cf. Quilling v. Trade Partners*, 2006 WL 897093, *3 (W.D. Mi. 2006); *Pardo v. Gonzaba*, 308 B.R. 183, 188-89 (Bankr. D. Del. 2004); *Levine, as Receiver v. Shacklett*, Case No. 8:04-cv-1164-T-24EAJ (M.D. Fla.) (Doc. 45). In that regard, this Court has previously recognized that the Receiver "is not himself a typical litigant." *In re Burton Wiand R'ship cases pending in the Tampa Div. of the Middle Dist. of Fla.*, 2008 WL 818504, *1 (M.D. Fla. 2008).

As the R&R notes, a "party cannot place the making of an arbitration agreement in issue simply by opining that no agreement exists. Rather, that party must substantiate the denial of the contract with enough evidence to make the denial colorable." 957 F.2d at 855. Further,

> To make a genuine issue entitling the [party seeking to avoid arbitration] to a trial by jury [on the arbitrability question], an unequivocal denial that the agreement had been made [is] needed, and some evidence should [be] produced to substantiate the denial.

Id. at 854.[19] Here, the Receiver did not "simply opine" that no agreement existed; he unequivocally denied its existence and his counsel submitted a declaration attaching, in relevant part, true and correct copies of the Indictment and Nadel's plea agreement, which led to Nadel's guilty plea in federal court on February 24, 2010. *See, e.g.*, Morello Decl. Exs. 2, 3. He also referenced specific documents in the record of the S.E.C.'s enforcement actions against Nadel and the Moodys charging them with securities fraud in connection with the Ponzi scheme underlying these cases and in which Nadel and the Moodys consented to entry of judgments against them. *See* Omnibus Opp'n at 12-14 (citing authority showing Court could take judicial notice of those matters). Further, the Receiver discussed how

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[19] Pursuant to 9 U.S.C. §4, "[i]f the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof." In that regard, "[i]f there is doubt as to whether such an agreement exists, the matter, upon a proper and timely demand, should be submitted to a jury. Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement." *Par-Knit Mills,* 636 F.2d at 55. Here, the Receiver met his initial burden of producing "some evidence" challenging the existence of the purported arbitration agreements. Consequently, he has put their existence "in issue" and, at worst, is entitled to a trial on the question. *See Chastain,* 957 F.2d at 854 (holding that "it is clear that Chastain is entitled to a trial on the issue of whether or not she is bound by the customer agreements").

Nadel's guilty plea to all counts in the Indictment operated as Nadel's admission of all allegations in the Indictment and how those allegations established as a matter of law the Hedge Funds were operated from their inception as a Ponzi scheme.[20] Collectively, this evidenced that the Fund Managers did not have authority to bind the Hedge Funds to Scheme Offering Documents because those documents were used exclusively to raise money for a Ponzi scheme that injured the Hedge Funds.

Like the plaintiff in *Chastain*, the Receiver here submitted "much more than 'some evidence' to substantiate [his] . . . denial" that the Scheme Offering Documents reflected any contract involving the Hedge Funds: he had a criminal Indictment against Nadel for perpetrating the scheme underlying these cases from 1999 to 2009; he had Nadel's guilty plea to all counts in that Indictment; he had Nadel's admissions that he used the Hedge Funds from their inception to perpetrate his Ponzi scheme; and he had SEC charges (which led to consent judgments) that Nadel and the Moodys engaged in securities fraud. *Chastain*, 957 F.2d at 854. At a minimum, this proof, and its legal ramifications, made the Receiver's "denial" of the existence of any contract "colorable." *Id.* at 855. Thus, like in *Chastain*, the "trigger of the court's power to compel arbitration . . . – the existence of a presumptively valid arbitration agreement contained within a contract signed by the parties – is entirely absent in this case." *Id.* (emphasis added). At a minimum then, the Receiver was entitled to a trial on the issue of whether any contract with an arbitration agreement between each

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[20] Before the R&R was issued, the Receiver also filed detailed motions for partial summary judgment in each of these cases addressing the preclusive effect of Nadel's guilty plea and his consequent admissions. *See, e.g.*, *Roby* Receiver's Omnibus Mot. for Partial Summ. J. (Doc. 36).

Hedge Fund and each defendant ever came into existence (9 U.S.C. § 4) and thus the R&R errs by compelling arbitration.[21]

III. THE R&R IMPROPERLY FAILS TO CONCLUDE THAT ONLY SOME OF THE RECEIVER'S CLAIMS WOULD BE ARBITRABLE, AND IN DOING SO, IT CONTRADICTED ITSELF

Even ignoring the reasons discussed in these objections for why arbitration is not required, and assuming *arguendo* the Receiver must arbitrate, the R&R also erred in concluding that all claims are arbitrable. In each of these cases (and every other pending clawback case), the Receiver asserts separate FUFTA and, in the alternative, unjust enrichment claims on behalf of each of the six Hedge Funds. *See, e.g.*, *Roby* Compl. ¶¶ 12, 107, 113-114 (Doc. 1). Although the R&R recognizes that no defendant claims to have an arbitration agreement with each of the six Hedge Funds, it still concludes the Receiver must arbitrate all claims, including those asserted on behalf of Hedge Funds that did not have any purported agreement with the pertinent defendant. R&R at 25.

According to the R&R, "these clawback actions center on a contractual agreement between a [d]efendant and the relevant Hedge Fund;" the Receiver "collectively represents" all of the relief defendants in the *SEC Action*; and that "should [he] . . . be successful against a [d]efendant in an arbitral forum and collect an award, [he] . . . will be duty bound to pour those proceeds into the receivership pot for eventual distribution as ordered by the district judge overseeing" the *SEC Action*. R&R at 25. Based on these perceptions, the R&R

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[21] "The district court, when considering a motion to compel arbitration, which is opposed on the ground that no agreement to arbitrate had been made between the parties, should give to the opposing party the benefit of all reasonable doubts and inferences that may arise." *Par-Knit Mills*, 636 F.2d at 54.

concludes the Receiver "is not entitled to fractionally separate his causes of action against a [d]efendant." *Id.* That conclusion, however, fails to appreciate the facts and the law. It fails to appreciate the facts because the Receiver (1) does not try to "fractionalize" his claims, but instead properly asserts separate claims on behalf of each of six legally separate Hedge Funds; and (2) asserts no breach of contract claim. It fails to appreciate the law because (1) each Hedge Fund was injured by transfers from Nadel's Ponzi scheme to the defendants; and (2) arbitrable claims may be compelled to arbitration while non-arbitrable claims proceed in court. But most importantly, it fails to apply a legal principle that it earlier recognized: each defendant must show the existence of an arbitration agreement with each of the six Hedge Funds to arbitrate all of the Receiver's claims. Here, no defendant even claims to have an arbitration agreement with each Hedge Fund.

A. The R&R Ignored That Each Hedge Fund Is A Separate Legal Entity That Was Injured By Nadel's Scheme

Each of the six Hedge Funds is a distinct legal entity with its own rights and obligations. *See, e.g.*, *Scholes*, 56 F.3d at 754 (holding that entities involved in Ponzi scheme are "nevertheless in the eyes of the law separate legal entities with rights and duties"); *Steinberg ex. rel. Lancer Management Group LLC v. Alpha Fifth Group*, 2010 WL 1332844, *3 n.2 (S.D. Fla. 2010) (following *Scholes*); *Stenger v. World Harvest Church, Inc.*, 2006 WL 870310, *5 (N.D. Ga. 2006) (same). When Nadel caused Hedge Funds to transfer money to the defendants as part of his Ponzi scheme, the entity itself was injured. *See, e.g.*, *Scholes*, 56 F.3d at 754 (operator of Ponzi scheme "removed assets from the corporations for an unauthorized purpose and by doing so injured the corporations"); *Grand St. Trust*, 2005 WL 1983879 at *5 ("[T]he transferred funds were owned by [the receivership entity]. When

these funds were fraudulently transferred, [the receivership entity] was damaged due to the loss of these funds."); *Marwil*, 2003 WL 23095657 at *7 (receivership entity "itself has suffered an injury"); *Freeman*, 865 So. 2d at 551 ("[T]here are actions that the corporation, which has been 'cleansed' through receivership, may bring directly against the principals or the recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation and taken prior to the receivership . . . .").

The injury extends to each Hedge Fund because they were operated as a single Ponzi scheme, Nadel commingled their money, and transfers to the defendants and other investors were paid from that pooled money. *See, e.g.*, *Roby* Compl. ¶ 114. Because that pooled money consisted of money invested with each of the Hedge Funds, whenever any of that money was transferred to the defendants as purported "profits" or "principal," the defendants necessarily received commingled money of each Hedge Fund. Further, investors in a Ponzi scheme have a claim to their invested principal (minus any redemptions). *See, e.g.*, *In re Bayou Group, LLC*, 372 B.R. 661, 665 (Bankr. S.D.N.Y. 2007). Every transfer of pooled funds to the defendants (and other investors) as part of Nadel's Ponzi scheme depleted invested principal which in turn increased the amount of investors' claims against the Hedge Funds. *See In re McCarn's*, 326 B.R. at 851 ("A 'Ponzi scheme' is a fraudulent investment arrangement in which returns to investors come from monies obtained from new investors rather than an underlying business enterprise."); *see also In re Ramirez Rodriguez,* 209 B.R. 424, 432 (Bankr. S.D. Tex. 1997) ("An enterprise engaged in a Ponzi scheme is insolvent from its inception and becomes increasingly insolvent as the scheme progresses.");

Cunningham v. Brown, 265 U.S. 1, 8 (1924) (Ponzi "was always insolvent, and became daily more so, the more his business succeeded").

B. The R&R Ignores Its Own Acknowledgment That Each Defendant Must Show The Existence Of An Arbitration Agreement Covering Each Claim

The R&R recognizes that to arbitrate a claim, a defendant must establish the existence of an arbitration agreement covering that claim. R&R at 10. This showing is necessary because "[a]rbitration is at its core a matter of contract," so arbitration "can only be compelled when the subject of the dispute has been agreed to be settled by arbitration . . . ." *Klay*, 389 F.3d at 1201, 1202; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (arbitration "is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); *Granite Rock Co.*, 130 S. Ct. at 2856 ("[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*.").

The R&R, however, disregards this rule in concluding that all claims asserted by the Receiver against each defendant, including claims on behalf of Hedge Funds with which the applicable defendant does not even contend having an arbitration (or any other) agreement, are arbitrable. *See* R&R at 25. Significantly, the R&R cites no authority for disregarding the rule, and it appears to reject application of that rule because it concludes the Receiver's attempt to assert claims on behalf of each Hedge Fund is "without merit." R&R at 25. This conclusion is wrong for two reasons. First, because as discussed below in Section II.D., applicable law unwaveringly places on the defendants the burden of showing the existence of an arbitration agreement covering each claim they seek to arbitrate, and the R&R does not identify any contradictory authority. Second, because the motions to compel do not offer the

opportunity to evaluate the merits of the Receiver's claims on behalf of each Hedge Fund like a Rule 12(b) motion would. Instead, the salient issue is simply whether those claims are subject to arbitration.

C. The R&R Disregards Precedent Recognizing That Even When Certain Claims Are Arbitrable, Non-Arbitrable Claims Should Proceed In Court

Under FAA Section 3, a stay is mandatory for arbitrable claims. *McMahon,* 482 U.S. at 226. However, non-arbitrable claims may proceed in court. *See Klay*, 389 F.3d at 1204 ("Because it is well established that a district court may order arbitration and refuse to stay nonarbitrable proceedings, the district court was properly within its discretion to refuse [defendants'] motion to stay litigation of nonarbitrable claims."). Indeed, "courts generally refuse to stay proceedings of nonarbitrable claims when it is feasible to proceed with the litigation." *Id.* ("[H]eavy presumption should be that the arbitration and the lawsuit will each proceed in its normal course" (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). Here, even if some of the Receiver's claims are arbitrable (*i.e.*, the claims in each case on behalf of Hedge Funds with which the defendants in that case invested), the majority of them are not (*i.e.*, the claims in each case on behalf of the other Hedge Funds) because most defendants only invested in one Hedge Fund.[22]

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[22] For example, the defendant in *Wiand, as Receiver v. Ellen Schwab*, Case No. 8:10-cv-130-T-17MAP (M.D. Fla.), received fraudulent transfers directly from Hedge Fund Valhalla Investment Partners, L.P. *See E. Schwab* Compl. Ex. A (Doc. 1). Because Nadel comingled the Hedge Funds' money, the money in the Valhalla bank account from which that defendant received transfers necessarily contained money invested with other Hedge Funds too. Accordingly, the Receiver asserted claims against the *E. Schwab* defendant to recover on behalf of Valhalla as well as on behalf of the rest of the Hedge Funds: Viking, Viking IRA, Victory, Victory IRA, and Scoop. The defendant, however, never even contended that she had an arbitration agreement with any Hedge Fund other than with Valhalla. *See E. Schwab*

(footnote cont'd)

Although proceeding against a defendant in both an arbitral forum and this Court is inefficient, inefficiency provides no ground to suspend the "heavy presumption" that both proceedings will move forward. *See Dean Witter Reynolds*, 470 U.S. at 217 ("heavy presumption" applies "even where the result would be the possible inefficient maintenance of separate proceedings in separate forums"). Simultaneous proceedings are particularly appropriate here for the Receiver's compliance with his duty to marshal assets for distribution to Nadel's victims. Staying proceedings in this Court pending arbitration against the same defendant would unnecessarily delay matters and consequently delay relief to victims. Of course, the most efficient procedure would be to adjudicate all of the Receiver's claims in one forum. As discussed in Section I, Congress has deliberately conferred on this Court authority to do just that: reject arbitration and allow the Receiver to proceed with all claims in this Court. That would maximize the benefit to the Receivership Estate and, ultimately, to Nadel's victims.

D. The R&R Incorrectly Characterizes The Claims In These Cases As "Center[ing] On" Or "Arising Under " A Contract

In this (and another) context, the R&R states the Receiver's claims "center on" or "arise under" the purported contracts reflected by the Scheme Offering Documents. *See* R&R at 18, 25. The R&R, however, is wrong, and it fails to cite any supporting authority. The claims in these cases are for violations of FUFTA and unjust enrichment – they are <u>not</u>

Mot. to Compel at 17 (Doc. 20). Thus, there is no arguable basis to arbitrate any claim asserted by the Receiver against that defendant except for the claims asserted on behalf of Valhalla. The claims asserted against that defendant on behalf of the other five Hedge Funds are simply not arbitrable and thus should proceed in this Court.

for breach of contract and they do not "arise under" or "center on" any contract. *See In re Charys Holding Co., Inc.*, 443 B.R. 628, 635 (Bankr. D. Del. 2010) (fraudulent transfer claims "arise by operation of statute" and thus "arise irrespective of any contract between the parties"); *In re Consolidated Capital Equities Corp.,* 143 B.R. 80, 84 (Bankr. N.D. Tex. 1992) ("A suit to avoid a fraudulent transfer is not a suit on a contract . . . ."); *In re Morse Tool, Inc.,* 108 B.R. 384, 386-387 (Bankr. D. Mass. 1989) ("But this is a fraudulent conveyance action, not a contract action."). Rather, they are simply claims for recovery of the receivership entities' property that was improperly transferred to the defendants.[23] *See Freeman*, 865 So. 2d at 551 (clawback claims are "actions . . . to recover assets rightfully belonging to the corporation and taken prior to the receivership"); *Waxenberg I*, 2007 WL 963165 at *7 (unjust enrichment claim seeking recovery of transfers of Ponzi scheme proceeds "may be properly categorized as an action . . . to recover assets rightfully belonging to the corporation"); *see also Knauer*, 348 F.3d at 231-36 (distinguishing fraudulent conveyance claims "seeking to recover the diverted funds from the beneficiaries of the diversions" from claims seeking "tort damages from entities that derived no benefit from the embezzlements" and noting that, with respect to the former category, the law "favor[s] exceptional treatment of receivers").

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[23] For this reason, the R&R incorrectly fails to find the Receiver's claims are not within the scope of the purported arbitration clauses relating to Scoop. Although federal policy requires a court to resolve any doubt over application of an arbitration clause in favor of arbitration (*see supra* Section II.C), that policy may not expand the scope of a contract beyond that intended by the parties. *Seaboard Coastline R. Co. v. Trailer Train, Co.*, 690 F.2d 1343, 1352 (11th Cir. 1982).

IV. THE R&R INCORRECTLY CONCLUDES CLAIMS RELATING TO TRANSFERS FROM VALHALLA ARE ARBITRABLE

Even ignoring the previous arguments made in these objections, Valhalla did not have an agreement to arbitrate with any defendant for another reason, and to the extent any such agreement did exist, the language of the arbitration clause in Valhalla's Scheme Offering Documents limited arbitrators' authority to "construing and enforcing the terms and conditions of the Valhalla Scheme Offering Documents." The Receiver's claims, however, do not involve construction or enforcement of any terms in those documents. *See, e.g., supra* Section III.D. Also for these reasons, the R&R's conclusion that claims relating to transfers from Valhalla are arbitrable is wrong.

A. The Valhalla Scheme Offering Documents' Arbitration Provision Applies Only To The Valhalla Fund Manager And Valhalla Investors; It Does Not Apply To Hedge Fund Valhalla

Pursuant to the plain language of the arbitration provision in the Valhalla Scheme Offering Documents, Valhalla does not have an agreement to arbitrate with any defendant. In relevant part, that document states:

> Section 10.10 Arbitration. All controversies arising in connection with the Partnership's business and between or among the Partners, shall be settled by arbitration, to be held in the City of Chicago, State of Illinois, under the then prevailing rules of the American Arbitration Association. In any such arbitration, each of the parties hereto agrees to request from the arbitrators that (a) their authority be limited to construing and enforcing the terms and conditions of the Agreement as expressly set forth herein, (b) the reason for their award be stated in a written opinion, (c) they shall not make any award which shall alter, cancel or rescind any provisions of this Agreement, and (d) their award shall be consistent with the provisions of this Agreement. The award of the arbitrators shall be final and binding, and judgment may be confirmed and entered thereon in any court of competent jurisdiction.

See Morello Decl., Ex. 4 § 10.10. (emphasis added). That document specifically defines "Partners" as the "General Partner" (*i.e.*, the Valhalla Fund Manager) and the "Limited Partners" as the investors in Valhalla. *See id.* The first sentence of that document states the purported agreement "is made and entered into . . . between the undersigned parties hereto," and the last page implicitly identifies those parties as the "Partners," as they are the only signatories. In other words, according to the plain language of Valhalla's relevant Scheme Offering Document, only the "Partners" have purportedly agreed to arbitrate, not the limited partnership entity, Valhalla. *See* Fla. Stat. § 620.1104(1) (limited partnership is an entity distinct from its partners); Fla. Stat. § 620.1105 (limited partnership "has the powers to do all things necessary or convenient to carry on its activities, including the power to sue, be sued, and defend in its own name and to maintain an action against a partner for harm caused to the limited partnership by a breach of the partnership agreement or violation of a duty to the partnership"). As a result, there is no agreement to arbitrate between these defendants and Valhalla.

The R&R recognizes this argument, but it disregards the plain language of the arbitration clause. *See* R&R at 15. Specifically, it concludes the Receiver's claims relating to transfers from Valhalla are arbitrable because the arbitration provision covers "[a]ll controversies arising in connection with the Partnership's business." *Id.* But the R&R ignores the rest of the relevant sentence: that such "controversies" not only have to "arise[] in connection with the Partnership's business," but they also have to be "between or among the Partners." *See id.* As previously noted, "Partners" includes Valhalla Fund Manager and the investors, but does <u>not</u> include Valhalla. Valhalla is simply not a "Partner" (under the

pertinent document's definition or under law), and the arbitration agreement does not cover it.

The R&R improperly reads the pertinent sentence disjunctively, so as to separate controversies "arising in connection with the Partnership's business" from those "between or among the Partners." This interpretation is wrong for two reasons. First, because it is grammatically improper as, in relevant part, it uses the conjunction "and" instead of "or" (*i.e.*, "All controversies arising in connection with the Partnership's business and between or among the Partners"). Second, because the R&R's interpretation would require arbitration of all "controversies arising . . . between or among the Partners," regardless of whether the controversy bears any relation to the "Partnership," Valhalla.

B. Even If Valhalla Is Subject To That Arbitration Provision, The Receiver's Claims Are Outside Its Scope

The R&R incorrectly concludes the pertinent arbitration provision "could not be broader" because it relates to "[a]ll controversies arising in connection with the Partnership's business." R&R at 16. In so concluding, however, the R&R again disregards the plain language of the arbitration provision. The next sentence explicitly limits the arbitrator's authority "to construing and enforcing the terms and conditions of the Agreement." The Receiver's claims in these cases, under FUFTA and for unjust enrichment, involve recovery of receivership assets that were impermissibly transferred to the defendants from the Hedge Funds' commingled money. Those claims are not for breach of Scheme Offering Documents, do not relate to the "terms and conditions of" those documents, or involve in any way any other bogus (or even legitimate) document relating to Valhalla. *See supra* Section

III.D. Accordingly, under the plain language of Valhalla's Scheme Offering Documents, the Receiver's claims fall outside the scope of matters an arbitrator is authorized to decide.[24]

The R&R asserts the parties can address that matter with the arbitrator, but that too is wrong because such a delegation must be made "clearly and unmistakably." *Terminix Int'l. Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1332 (11th Cir. 2005). Here, that did not occur. To the contrary, the delegation was limited to construction and enforcement of purported contract terms. It was also limited by additional language forbidding arbitrators from "mak[ing] any award which shall alter, change, cancel, or rescind any provision" of that purported agreement.

Further, the R&R is wrong because it fails to consider the practical effect of its recommendation to compel arbitration of a matter that an arbitrator has no power to hear under the purported arbitration agreement's plain language. Specifically, the R&R states the arbitrator must determine the validity of the Scheme Offering Documents. *See* R&R at 12-13. But that disregards that Valhalla's Scheme Offering Documents expressly state the

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[24] One matter a court must consider in deciding arbitrability is whether a dispute falls within the scope of a pertinent arbitration agreement. *Fla. Farm Bureau*, 2005 WL 1345779 at *3. By agreement, however, a decision on this issue may be transferred to an arbitrator. Although the Valhalla Scheme Offering Documents' arbitration language's incorporation of the rules of the American Arbitration Association purported to do that, that conferral was negated by provisions discussed in the next few paragraphs which limited the arbitrator's authority to a narrow set of issues that do not encompass scope or any other element of a determination of arbitrability. *See, e.g.*, *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 80 (Del. 2006); *Burlington Resource Oil & Gas Co. v. San Juan Basin Royalty Trust*, 249 S.W. 3d 34, 41 (Tex. Ct. App. 2007).

If an arbitrator decided any matter which did not involve "construing and enforcing the terms and conditions of the Agreement," either party could argue the arbitrator "exceeded [its] powers" and move to vacate any award. *See* 9 U.S.C. § 10.

arbitrator "shall not make any award which shall alter, change, cancel, or rescind any provision of the Agreement." Thus, assuming a pertinent arbitration agreement exists, if the arbitrator is foreclosed from "cancel[ing]" or "rescind[ing]" the agreement, the Receiver would be foreclosed from having his challenge to its validity or legality decided by the arbitrator. While under normal circumstances a challenge to a contract's validity is decided by arbitrators (*see Prima Paint*, 388 U.S. at 403-04), the circumstances here require the Court to make that determination in light of the express language of the purported arbitration agreement. Otherwise, the R&R's recommendation forces the Receiver to move to a forum where neither his claims nor his challenge to contract validity can be heard. That result is simply wrong.

V. THE R&R INCORRECTLY CONCLUDES CLAIMS RELATING TO TRANSFERS FROM SCOOP ARE ARBITRABLE

Even ignoring the previous arguments made in these objections, Scoop still did not have an agreement to arbitrate with any defendant, and to the extent any such agreement did exist, the language of the arbitration clause in Scoop's Scheme Offering Documents does not encompass the Receiver's claims on behalf of it. Accordingly, the R&R's recommendation to compel arbitration of all claims asserted by the Receiver on behalf of Scoop is wrong also for this reason.

Similar to Valhalla's, Scoop's Scheme Offering Documents limit arbitration to disputes among the "Partners" (although it refers to them as "Investors") and thus does not cover disputes between "Partners" and Scoop or its Receiver. As stated on page 1 of Scoop's "Limited Partnership Agreement" (the "**Scoop LP Agreement**"), which is the Scheme Offering Document that contains arbitration language relied upon by the defendants, "THIS

LIMITED PARTNERSHIP AGREEMENT is made and entered as of November 1, 2004 by and among Scoop Capital, LLC, . . . (the "General Partner") and the Investors." The signature page of that "agreement" states, "the undersigned has signed this Agreement on its own behalf as General Partner and on behalf of the Investors who are considered to have executed this Agreement pursuant to Section 15.5 and the Delaware Act." *See* Morello Decl., Ex. 6 at 1, 42 (emphasis added). As the plain language states, the "General Partner" (*i.e.*, Fund Manager Scoop Capital, LLC) purportedly executed the "agreement" "on its own behalf" and not on behalf of Hedge Fund Scoop. As a result, according to the plain language of the purported agreement containing the pertinent arbitration clause, that purported arbitration agreement does not encompass Scoop.

The R&R, however, concludes that argument fails because of paragraph 15.8 of the Scoop LP Agreement, which states:

> **15.8 Binding Effect.** This Agreement shall be binding upon and shall inure to the benefit of the Limited Partners (and their spouses if the Interests of such Limited Partners shall be community property). This Agreement constitutes the entire agreement among the Fund and the Limited Partners with respect to the formation of the Fund, other than the Subscription Agreement entered into between the Fund and each Investor.

Specifically, the R&R finds this paragraph makes the entire Scoop LP Agreement binding on Scoop even though Scoop is not a signatory to that "agreement." But this finding ignores the plain language of paragraph 15.8, which, in relevant part, acknowledges the Scoop LP Agreement is "binding" on the Limited Partners (*i.e.*, the investors) but not on Scoop (by operation of other provisions, it is also binding on the "General Partner" (or Fund Manager Scoop Capital, LLC). The second sentence of paragraph 15.8, which mentions Scoop, is

simply a merger clause and does not create a substantive contractual right where none otherwise exists.

CONCLUSION

For these reasons, the Receiver respectfully requests that following the Court's *de novo* review of the matters to which the Receiver objects, those objections be sustained and the motions to compel arbitration be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 22, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

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EXHIBIT A
Numerical Order by Case Number

DEFENDANT	CASE NO.	R&R DOC. NO.	FUND(S)	RECOVERY SOUGHT
Roby, Peter and Katherine Roby	8:10-cv-071	Doc. 41	Viking	$94,185.62
Hailey, Charles A.	8:10-cv-096	Doc. 44	Viking	$100,460.63
Weinberg, Gregg, as Trustee of the Commonwealth Radiology, PC Profit-Sharing Plan	8:10-cv-097	Doc. 42	Viking	$44,061.70
Whitlock, John D.	8:10-cv-119	Doc. 44	Victory	$73,042.15
Turner, Rodney Nigel	8:10-cv-123	Doc. 43	Viking	$751,208.37
W.W. Whitlock Foundation	8:10-cv-125	Doc. 44	Viking	$169,211.25
Schwab, Ellen	8:10-cv-130	Doc. 48	Valhalla	$193,333.58
Swenson, Paul	8:10-cv-134	Doc. 45	Viking IRA	$49,716.92
Steinhauser, Edward and Diane Schwab	8:10-cv-157	Doc. 47	Valhalla	$45,366.16
Zak, Daniel A., individually and as Trustee of the EMPG NW P.C. MMP & PS Trust	8:10-cv-161	Doc. 47	Valhalla Scoop	$91,366.04
Zak, Marian, as Trustee of the Marvin Zak and Marian Lyle Zak Bypass Trust u/a dtd 10/16/1998	8:10-cv-170	Doc. 42	Scoop	$22,995.73
Gilbert, Harvey A. and Deanne E. Gilbert, as Co-Trustees of the Gilbert Family Trust	8:10-cv-171	Doc. 43	Viking	$25,827.58
Russell, Richard E., individually and as Trustee of the Richard E. Russell Revocable Living Trust	8:10-cv-176	Doc. 44	Viking IRA Victory	$149,644.43
Mayfair Associates	8:10-cv-179	Doc. 48	Viking	$241,559.35
Whitlock, John D., as Trustee of the W.W. Whitlock PC Pension Trust	8:10-cv-180	Doc. 43	Viking	$177,227.62
Schneiderman, Roberta and Robert D. Zimelis, as Co-Executors of the Estate of Herbert Schneiderman	8:10-cv-181	Doc. 42	Victory	$163,660.48
Whitlock, John and Thomas Luck, as Co-Trustees of the Edward J. Whitlock, Jr. Marital Trust Two	8:10-cv-184	Doc. 46	Victory	$41,630.76
Schwab, Walter L., as Trustee of the Walter L. Schwab Revocable Trust dtd 10/23/1991	8:10-cv-185	Doc. 47	Scoop	$533,883.59
World Opportunity Fund, L.P.	8:10-cv-203	Doc. 39	Valhalla	$2,290,865.60
The Carrswold Partnership	8:10-cv-212	Doc. 46	Valhalla Victory Viking	$3,762,059.70
Lawrence, Kathryn	8:10-cv-218	Doc. 40	Viking IRA	$46,959.12
Schmidt, Dominique and Caroline Schwab	8:10-cv-223	Doc. 46	Valhalla	$40,871.14
Schwab, Betty Bry, as Trustee of the Betty Bry Schwab Revocable Trust	8:10-cv-226	Doc. 48	Viking Scoop	$109,800.15
TOTAL AMOUNT SOUGHT:				**$9,218,937.67**